IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1254 of 1996
with
SPECIAL CIVIL APPLICATION NO 5412 OF 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAMESHBHAI D PATEL - Petitioner(s)
Versus
UNITED CATALYST INDIA LTD - Respondent(s)

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Appearance :
MR RAJESH P MANKAD for Petitioner(s) : 1,
MR Ashish R. MAJMUDAR for Respondent(s) in both the matters.

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 11/07/2006

ORAL JUDGMENT

Heard learned Advocate Mr. Rajesh P. Mankad for the workman and Mr. K.M. Patel with Mr. AR Majmudar

for the employer. In both the petitions, one and the same award passed by the labour court, Baroda in Reference No.263 of 1984 dated 17.1.1995 is challenged. The workman filed Special Civil Application NO.1254 of 1996 against denial of 50 % back wages. By filing special civil application No. 5412 of 1995, the employer has challenged the said award of reinstatement with 50 per cent back wages for intervening period, dated 17.1.1995 wherein this Court (Coram : Hon'ble Mr. Justice M.R.Calla) has passed following order on 26th September, 1995:

> “Mr. P.B. Majmudar for the petitioner. No one appears for the respondent despite service.
>
> Rule. It is submitted by Mr. Majmudar that in pursuance of the Award by the Labour Court, respondent workman was reinstated. He came for few days and has again fled away. It is also submitted that the respondent workman is engaged in his own business. In such circumstances, no orders are necessary to be passed unless the respondent workman takes up

any proceedings for recovery of back wages or for enforcing to work again with the petitioner.It will be open for the petitioner to apply for interim relief if necessity arises."

By impugned award dated 17.1.1995, labour court has granted reinstatement with continuity of service with 50 per cent back wages for an intervening period with all consequential benefits. Workman was working with the employer since 1979. Incident occurred on 2nd September, 1983. Then, memo/show cause notice dated 6th September, 1983 was served upon the workman. As per the impugned award, the workman was appointed and working with the employer with effect from 5.12.1978 and was receiving salary of Rs.1325.00. Alleged accident occurred on 2nd September, 1983. Thereafter, reply was given by workman on 9th September, 1983. Thereafter, according to the workman, he met to one Shri Lalajee Sheth at Bombay but he was not allowed to resume duty by the management and again he met Lalajee Sheth at Bombay and thereafter, according to instruction, he met the

officer concerned on 19th September, 1983 wherein the concerned officer asked him to tender letter of apology. He accordingly tendered letter of apology on 22.9.1983. After receiving letter of apology from workman, according to the workman, his services were illegally terminated on 23.9.1983 by the Company. These are the facts mentioned by the workman in his statement of claim. Reply was filed by the Company at Exh. 10 denying the averments made in the statement of claim and it was also contended that the workman is not covered by the definition of 'workman' under section 2(s) of the ID Act, 1947 and, therefore, reference is not maintainable. It was admitted by the company that he was drawing salary of Rs.1325.00 p.m. According to the company, the employee was in managerial position, working as shift in charge and he was having the power of supervision and control as well as to issue direction and, therefore, not covered by the definition of 'workman' under section 2(s) of the ID Act, 1947. The work of workman was technical in nature, complicated. Ordinary mistake has put company in damage and, therefore, due to negligence on the part of the

workman, one total lot has been found to be defective and due to that such loss suffered by the company, explanation from workman was called for on 2nd September, 1983 but his conduct was rough and he left the job without any permission and, therefore, show cause notice was served calling for explanation from the workman. Workman tendered letter of apology voluntarily. There was no force or coercion for obtaining the letter of apology and it is not the termination by the company but the workman has left job at his own. It is also the contention raised by the company in his written statement that the company has lost confidence because due to his negligence, heavy loss/damage has been suffered by the company and, therefore, reference is required to be rejected.

Before the labour court, vide Exh. 19, 29, 30 and 38, both the parties produced relevant documents on record. Workman was examined vide Exh.15 and reiterated the facts mentioned in his statement of claim. In his deposition before the labour court, the workman made clear statement that he was not having any power to make appointment or to terminate

service of any employee and he was also not having any power to sanction leave of any employee. He was working as a Chemist analyst and to direct the workers about production. On the date of incident, , manager as angry with him and that is why, false allegations were made against him and he was insulted by the officer and was informed to get out from the place. Reply given by the workman was received by the company. No departmental inquiry was conducted against him. No written order of termination has been issued against him. As regards letter of apology, it was stated by him that it was given by him because of the fact that Shri Lalajee Sheth instructed him that he will be taken back in service. Accordingly, on that basis, letter of apology was given by him but after giving letter of apology, he was not taken back in service but his services were orally terminated by One Mr. A. Prakash, Officer-in-charge. In his cross examination, he stated that he was working on technical post, catalyst is being used in petrochemical refinery etc., 20 to 25 types of catalysts are being manufactured. When process has to be changed, machine has to be cleaned. He has to do

the work of raw materials, testing, process, supervision, temperature maintenance solution and to get the work done by instructing persons assisting him. It is also deposed by him that he remained unemployed but he was helping his brother in his business. It was not stated to him by Lalajee Sheth to give letter of apology but was only informed to meet Mr. A. Prakash. Apology letter was given with hope that the company will continue him in service. Reply was given to the notice dated 8.9.1983. By Exh. 17, oral evidence was closed by the workman. Then, on behalf of the company, one Manager Prakash Dattatrey was examined. It was deposed by him that the services of workman were not terminated by him. No termination order was issued and no departmental inquiry was conducted by the Company. Notice Exh. 13/1 was served on workman but it was refused by him and then it was served upon him by Regd. Post A.D. Workman was reporting for work and he was working as production in charge who is required to supervise and to guide in production activity. Power has also been given to workman to take necessary action against workmen those who were

working under him. Company is having Certified Standing Orders which were produced before the labour court. No departmental inquiry was initiated by the company. These facts were admitted by the Manager on behalf of the Company. After oral evidence of both the parties, matter was heard by the labour court and after considering the evidence on record, labour court came to the conclusion that the respondent is a workman as defined under section 2(s) of the ID Act, 1947. Labour court also came to the conclusion that the work of the workman was technical in nature and he was receiving salary of Rs.1325.00 and he was not having any power to appoint and/or to terminate services of any employee. Labour court has also come to the conclusion that the workman was not working in managerial capacity. Labour court has also come to the conclusion that no departmental inquiry was conducted against him in respect of the allegations levelled in the show cause notice. Unless and until the company proves misconduct against workman, whatever allegations made in the show cause notice dated 5.9.1983 are remains as it is as same are not proved against workman. As regards the letter of

apology, it was considered by the labour court that this letter was given by the workman with hope that he would be taken back in service but after receiving such letter of apology from workman, without any inquiry, his service was terminated orally and he was not taken back in service and, therefore, such an action on the part of the management is contrary to the principles of natural justice. Labour court has also come to the conclusion that when it was the case of the company that the services of workman were never terminated but workman left job at his own, then, the company ought to have asked the workman to report for duty but no such efforts were made by the company to call workman to report for duty. Therefore, considering the conduct of the company, labour court came to the conclusion that the services of workman were terminated by the company without holding any inquiry, without giving any opportunity to him and, therefore, such termination is also violative of section 25F of the ID Act, 1947. As regards contention of the company about loss of confidence, labour court has come to the conclusion that there is no evidence on record which would

suggest that the company lost confidence against the workman. No details about nature of work of workman have been given by the company before the labour court and ultimately, labour court has come to the conclusion that the Standing Orders are applicable, no departmental inquiry is initiated by the company and the contention of loss of confidence has not been proved by the company before the labour court. Labour court has considered the evidence of workman about unemployment and helping to his brother in his business. Labour Court granted 50 % back wages with consequential benefits and reinstatement with continuity of service.

Witness for management Mr. A. Prakash has also deposed in his cross examination that that technical knowledge for work of plant at Baroda is necessary without which worker will not be able to do good job. This would suggest that the respondent workman would require technical knowledge while working as a chemist.

As referred to above the facts which are on

record before the labour court, I have narrated in detail with a view to appreciate the submissions made by the learned advocates for the parties.

Learned Advocate Mr. K.M. Patel appearing for the management has raised four contentions before this Court. One is the loss of confidence. Second is that he is not a workman. Third is that the letter of apology being admission of guilt, there is no necessity to initiate any departmental inquiry against the workman and fourth is that the charges against the workman are serious in nature. During the course of his arguments, learned Advocate Mr. Patel has referred to certain observations made by the labour court. In support of his contention, he referred to certain passage from the award. He relied upon the decision of apex court in case of S.K. Maini v. M/s. Carona Sahu Company Ltd. And others, reported in AIR 1994 SC 1825, paragraph 11. He emphasized his contention that the respondent is not a workman within the meaning of section 2(s) of the ID Act, 1947. He submitted that the apex court has considered that he is not a workman though either

incidentally he is required to do some clerical work or is not vested with power to appoint or discharge employees under him. Relying upon this decision, it was submitted by him that in the present case, respondent workman is not having power to appoint or terminate or incidentally doing some practical work as a chemist cannot be considered to be a workman. He submitted that his principal or main work is important and while doing that, he is out side the scope of workman. He submitted that the respondent is not a workman and therefore, whole reference ought to have been rejected by the labour court on that ground alone. He referred to the show cause notice and reply and also the apology letter tendered by the workman at page 27. It was his submission that once the apology has been given by the workman, it amounts to admission of his guilt and, therefore, there is no necessity of holding any inquiry by the management because the workman has voluntarily submitted letter of apology to the manager A. Prakash. He also placed reliance upon the apex court decision in case of Dharmarathakara Raibahadur Arcot Ramaswamy Mudaliar Educational

Institution versus Educational Appellate Tribunal and others reported in (1999) 7 SCC 332and submitted that no inquiry is necessary when one admits own's violations. He also submits that when no inquiry is necessary when there are undisputed facts for which there was no plausible explanation and affected person could not put forth any valid defence when opportunity was given by court, apex court has rejected plea on the facts of the case that the inquiry ought to have been conducted as provided under statutory rules but this is not necessary when allegations/charges are admitted and no plausible defence is placed before the authority concerned. Reliance was placed by him on para 8 of the said decision. Thereafter, he relied upon the decision of apex court in Addl. District Magistrate (City) Agra v. Prabhakar Chaturvedi and others, reported in AIR 1996 SC 2359. According to him, tendering of an apology letter amounts to clear admission on the part of the workman. According to him, when misconduct is admitted by the workman and explanation was given that incident occurred it was due to his carelessness, then, subsequently, request for

examining witnesses has been considered to be an after thought. Similarly, he submitted that in this case, the workman has tendered apology voluntarily and subsequently raised contention before the labour court that departmental inquiry was not initiated therefore, order of reinstatement is bad. Learned Advocate Mr. Patel also submitted that there is no question of terminating service of workman as no written order was issued by the management and, therefore, question of violation of section 25F/G/H is not arising at all. As regards his contention about the loss of confidence in the workman, he submitted that looking to the position of the workman as a chemist and looking to the nature of charges, if any deliberate attempt is made by the workman, then, it will result into blast in the factory and, therefore, position of workman as a chemist and nature of charges ought to have been taken into account by the labour court while granting relief. He also submitted that in the written statement to the statement of claim as well as in evidence of management, plea of loss of confidence has clearly been taken by the management but the same has

not been properly appreciated by the labour court while granting relief in favour of the respondent therefore, award of reinstatement is not sustainable. He also submitted that according to the deposition of the witness for management before the labour court, if the catalyst lower than the prescribed standard is used, then, it would affect quality of production and there would be blast. He, therefore, submitted that such person should not have to be granted reinstatement when the management has lost confidence in such a person. He submitted that at the relevant time, five chemists were working in the company and now company is having fifteen chemists in the establishment. He submitted that as per the evidence of the witness for the management before the labour court respondent workman was preparing all the raw material for preparing catalyst, work of preparation of mixture was being done by the workman. He referred to the daily news paper dated 5th September, 1985 wherein some news about theft was published but no name of workman is there. He also submitted that help to a brother in his business also amounts to gainful employment and, therefore, labour court

should not have granted 50 % back wages for intervening period. He placed reliance upon the apex court decision in UP State Brass ware Corporation Ltd. And Another versus Uday Narain Pandey, 2006 (1) SCC 479. He placed reliance upon paragraphs 40 to 44 and 61 of the said judgment wherein apex court has considered that the back wages cannot be considered to be an ordinary and normal relief when dismissal is set aside by the Court. No precise formula can be laid down as to when full back wages should be allowed. It will depend upon facts of each and every case as held by the apex court. Burden is upon the employee to prove that he was not gainfully employed and it is not upon the management to plead otherwise. Learned advocate Mr. Patel also submitted that section 106 of the Evidence Act is also considered by the apex court while deciding the issue about back wages. According to his submission, in the facts of this case, labour court should not have granted even 50 % back wages for intervening period as it was clearly found by the labour court that the respondent was helping his brother in his business. Ultimately, he submitted that these are four contentions raised

by him and in view of these factual aspects, award of reinstatement with 50 % back wages made by the labour court is required to be set aside and the reference is required to be dismissed by this court.

On the other hand, learned Advocate Mr. Mankad appearing for the workman has supported the award of reinstatement and has submitted that the letter of apology given by the workman cannot be considered as an admission of guilt but it is merely an explanation or clarification given by the workman that the particular incident has taken place due to misunderstanding between the parties, therefore, it cannot be considered to be an admission of guilt and that in the said apology letter, nowhere it is mentioned that the allegations made in the show cause notice are accepted by him and, therefore, tendering of letter of apology does not amounts to admission of guilt and, therefore, on that basis, it is not open for the petitioner to dispense with inquiry or to take any action adverse to workman on the basis of such letter of apology. According to him, such letter of apology was given by the workman as per the

demand of officer concerned. Learned Advocate Mr. Mankad further submitted that the respondent workman was working as chemist, his work was technical in nature with some of assistant workmen and he was having very limited powers over those workmen for issuing direction which cannot be considered that he is having supervisory powers or that he was working as supervisor or in the managerial capacity. He also submitted that the total salary of the workman was below Rs.1600.00 and, therefore, he is covered by the definition of workman under section 2(s) of the ID Act, 1947. Referring to the letter of appointment, submitted that no such powers have been given to workman. He also submitted that in daily news paper, news about theft was published wherein workman was not involved and no FIR was lodged against workman. He referred to appointment orders of each year by increasing salary of workman from time to time. He also submitted that in each year, work of the workman was appreciated by the management and after appreciation of work of each year, rise in salary was given to him as a reward of such appreciation of work by the management to the workman. He also submitted

that right from 1978, the year in which he was appointed till 1983 upto the date of incident, not a single memo was issued to workman by the management and there was no any allegation made by management against workman but workman was confirmed by the management. He referred to memorandum dated 31st March 1983 wherein his salary was fixed at Rs.1325.00 p.m. As per earlier order dated 31st March, 1982, his salary was Rs.1150.00. Prior to that, as per order dated 25th March, 1981, his salary was of Rs.1000.00 and on 31st March, 1980, his salary was at Rs.750.00 p.m. As on 31st March, 1979, his salary was of Rs.600.00 p.m. Appointment order is dated 5th December, 1978. At the time of appointment of workman, his emoluments were fixed at Rs.500.00 p.m. Meaning thereby, he started job with the salary of Rs.500.00 p.m. And within the span of five years, reached to Rs.1325.00 in 1983. Relying upon this document, he submitted that if the work of workman was not satisfactory or if the integrity of workman was doubtful, then, management would not have given such rise every year to workman and the workman would not have reached at the salary of Rs.1325.00 in 1983

from Rs. 500.00 fixed at the time of his appointment in the year 1978 and in view of this, contention of management abut loss of confidence is after thought and it was not mentioned in the show cause notice but raised only in written statement as well as in the deposition of witness for the management. He also submitted that no cogent evidence was produced by management before the labour court in support of its plea of loss of confidence in workman. According to him, post of chemist is not a post of confidence but it is technical in nature. He also submitted that the letter of apology was given on the basis of the fact that the workman had met on two occasions at Bombay Lalajee Sheth and ultimately he was asked by said Lalajee Sheth to met Mr. A.Prakash. It was given by him with hope that he will be taken back in service. He submitted that for what purpose, it was demanded by management. If management was not ready to reinstate or continue workman in service, then, there is no need to ask for any apology from the workman. He also submitted that the letter of apology was given with the hope that he would be continued in service and no adverse steps would be taken against

him by the management. With such expectation and having understood, the letter of apology was given as per demand which cannot be considered as admission on the part of the workman. In support of these contentions, he placed reliance upon the decision of the apex court in case of Biswajit Dev Roy And IOB and Others, reported in 1987 (1) LLJ 288. He also relied upon the apex court decision in case of Burmah Shell Oil Storage and Distributing CO. of India Ltd. (in CA NO. 1477 of 1970); the Burma Shell Management of Staff Association (In CA No. 1478 of 1970 v. The Burmah Shell Management Staff Association and others, reported in AIR 1971 SC 922. Relying upon the aforesaid decisions, it was submitted by him that in case of abandonment of duty or loss of confidence, it is the duty of the management to held departmental inquiry because in both occasions, there would be allegation against the workman. He also submitted that the loss of confidence is nothing but stigma which would require detailed inquiry before passing the order of termination against the workman. No such incident occurred during the five years period. He submitted that if the termination is simplicitor,

then, section 25F must be followed by the management. He also relied upon the decision given by the learned Single Judge of Madras High Court in case of Management of Bombay Ammonia (Madras) Pvt. Ltd. Madras And The Additional Commissioner for Workmen's Compensation II Madras and another, reported in 1988 (1) LLJ Madras page 203 and submitted that the plea of loss of confidence is required to be proved by cogent evidence and it must have to be proved by detailed inquiry and if it is not proved before the labour court, then, the workman is entitled for the relief. He also submitted that the workman is entitled for 100 per cent back wages for intervening period because workman has proved that he has remained unemployed during the intervening period and that he has not been gainfully employed during the intervening period. According to him, help to his brother in his business cannot be considered to be gainful employment. According to him, as against his plea about unemployment, no evidence was produced by the management to show otherwise and, therefore, labour court should have granted 100 per cent back wages for the intervening

period. He placed reliance upon the apex court decision in case of Chandu Lal v. The Management of M/s. Pan American World Airways Inc., reported in AIR 1985 SC 1128 wherein apex court has considered that the contention of loss of confidence itself is stigma/misconduct which would be required to be proved by holding departmental inquiry or by leading proper evidence before the labour court and if it is not proved, then, the contention of loss of confidence should not have to be relied upon by the Court while granting relief.

These are the submissions made by the learned Advocates for the parties relying upon various decisions in support of their contentions. Except the contentions recorded herein above, no other contentions have been raised by either of the Advocates before this Court. Except the decisions referred to herein above, no other decisions have been cited by either of the Advocates.

In both the petitions, respective parties have filed affidavits and rejoinder which have been

taken into consideration by this Court while examining these petitions. In light of the submissions made by the learned advocates for the parties and considering the law on the subject, the question is, whether the post of chemist could be considered to be the workman or not. Further, it is not in dispute that at the time when the services of workman were terminated, the workman was receiving wages of Rs.1325.00 In this back ground, according to my opinion, notice dated 2.9.1983 which has been served upon the workman is relevant, therefore, same is reproduced as under:

> “September 2, 1983 Exh.301
>
> TO : RD Patel
>
> From : A. Prakash.
>
> Sub : Disciplinary Action.
>
> I want to know your reasons why disciplinary action should not be taken against you on the following actions of yours :
>
> a) Not carrying out duties of Process Controls :
>
> 1) Checking size and crush of off

machine rings

2) Checking ingredients at the ball milling stage.

3) Maintaining proper concentration of Nickel in C11-NK lump.

b) Negligence and not following instructions :

1) When you were told to fill and maintain certain volume and weight of material in the finished product drum, it was not done.

2) When you were told to draw from stores 30 gms of Pd cl 2 you were found draving 50 grams instead.

3) Loss of production because you had not bothered to prepare enough feed for ringing.

Bad conduct, refusing to do your duties and insubordination:

1) When you were told to check what was wrong with the ring machine, you

refused saying, “Why should I go, I don't have to go”.

2) When the drier blower motor was under electrical maintenance and I asked what the position was, your reply was “It is not my job, it is your job.”

3) When I asked you for an explanation for your arrogant behaviour you replied “you can suspend me if you want.”

Second notice given by the Management to the workman dated 8.9.1983 is also relevant, same is, therefore, reproduced as under:

“This has reference to my memo to you dated September 2, 1983 on the following :

1) Not carrying out duties of Process Controls.

2) Negligence and not following instructions.

3) Bad conduct, refusing to do your duties and insubordination.

Being considered to be a responsible person, and as you are working during General Shift hours i.e. Between 0900 Hrs. and 1730 Hrs. I would have expected your reply within 24 Hours. It is more than 7 days now and you have not bothered to reply. You have also been absent for the past 7 days. This are again actions which show your indifferent attitude towards your job and welfare of the company.

This is to bring to your notice that although you have been given an opportunity to explain your behaviour and indifferent attitude, you have not bothered to do so.

This acts of attitude effects the general working of the factory and smooth running of the operations and will not be tolerated."

Letter written by the workman to FH Lalajee at

Bombay dated 8th September, 1983 is also relevant and material, therefore, same is reproduced as under:

“On September 2, I received memo from Mr. Prakash on the subject of disciplinary action. My reply to that and copy of his memo is enclosed for your kind consideration.

From joining date to today, I have never done anything wrong for the company. I am always loyal to the company and worked for the company at my level to the best of ability.

Now, I am going to the factory for Mr. Prakash is not allowing me inside the factory. He tell me not to enter the premises without his permission and so I cannot do my job. I have been put in to the trouble without any mistake.

In this case, I request you to give me justice so I can continue my duty. “

Workman gave detailed reply to show cause notice dated 2nd September, 1983 by letter dated 5th September, 1983 which is reproduced as under:

“ I have received your memo dated September 2, 1983 on the subject disciplinary action My reply to the

charges framed by you is given below.

a) Not carrying out duties of Process Control.

1. checking size and crush of off machine rings.

Checking size and crush of off machine rings is being done regularly during the day and proper specifications of size and crush are being maintained. For the night shift, workers go home only after giving their verbal report to me.

2. Checking ingredients at the ball milling stage.

In order to take the lump for ball miling, we have to check the nickel concentration and LOI for addition of callendum cement. The amount of callendum cement addition is calculated according to the formula given by you which is as follows:

(Wt. Of lump – Wt. Of LOI) Nickel % in lump

Nickel % in finished product.

Total weight including callendum cement.

Total weight – lump weight on dry basis.

Weight of callendum cement to be added to lump.

Therefore, to calculate the quantity of callendum cement the lump has to be analysed for nickel and LOI compulsorily.

This being done by our chemist regularly and a record is kept in a note book maintained by him.

3. Maintaining proper concentration of Nickel in C11-NK lump.

The solution of nickel nitrate is analysed and depending on the concentration of nickel in the solution, a measured volume of solution is taken for a batch of CII – NK catalyst. This has always been my practice and Chemist will testify to this. At time batch has been taken during the night shift when my presence is not there. On these occasions I leave instructions with the night shift workers. These instructions consist of various materials which have to be taken in a CII-NK batch, their weights and volume of nickel nitrate solution based on the analysis so a question of nickel concentration in the lump can never be wrong unless the analysis is wrong.

Negligence and not following instructions:

1. When you were told to fill and maintain

certain volume and weight of material in the finished product drum, it was not done.

I think you are referring to the consignment of C15-1 catalyst which was recently manufactured for the pool.

As per your instructions, 29 drums were filled with 200 lts. Of catalyst. At this stage gross weight of drums was between 230 to 233 kgs. After that, according to your instructions catalyst was added to increase the weight upto 240 kgs. Further on your instruction water was added to the catalyst in each drum to bring up the gross weight of drums from 240 kgs. to 255 kgs. So I do not understand why should be any allegation like this when everything was done according to your instructions.

2. When you were told to draw from stores 30 gms of Pd cl2 you were found drawing 50 grams instead.

I instructed Mr. Pirzada to take 30 gms. Pd cl2 for making solution. The Pd cl2 material was given by Mr. Bolar to Mr. Pirzada and given back by Mr. Pirzada to Mr. M. Bolar.

3. Loss of production because you had not bothered to prepare enough feed for ringing.

On the ring machine we are making two types of catalyst CII-N and CII-NK.

The claim the feed was not available is incorrect. There was a full drum (200 ltrs) CII-N granules kept ready for ring machine. Night shift worker was instructed to prepare CII-NK granules by mix mulling. In the morning I saw that CII-NK feed was not ready the workers explained that there was electrical problem and mix muller would not start. The workers contacted the electrician who came but could not repair and mix muller could not be started.

Bad conduct, refusing to do your duties and insubordination:-

1. When you were told to check what was wrong with the ring machine you refused saying “Why should I go, I don't have to go”

I never uttered the words which have been attributed to me in your memo. When you asked me about the ring machine, I replied that the bolts fitted hold the lower punch in the ring machine are bending. You asked me to harden the bolts by heating and immersing the hot bolts in oil. This was done by me and given to the ring machine operator and he was fitting them on the ring machine. There was no occasion where I could have given a reply saying 'why should I go”

2. When the drier blower motor was under electrical maintenance and I asked what the position was, your reply was 'it is not my job, it is your job.”

When you asked about the position of the drier blower motor I told you that the motor is working all right but after fitting blower impeller, the blower is tripping. So the blower impeller was given for repair after finding that fault was in the blower. I did

my job and never said that 'it is not my job, it is your job.”

3. When I asked you for an explanation for your arrogant behaviour you replied ' you can suspend me if you want.”

On Sept.2, when I came to the factory in the morning, I was asking the night workers about the production and other work which was given to them to be completed during night. At that time you came and asked me about the feed for ring machine. I told you that the workers told me that there was no power in the mix muller and hence CII-NK feed could not be prepared by them. On explaining this you immediately got angry and said ' get out you bloody donkey”. After that I moved from there and came and stood near the laborartory door. Again you came to me and said “Bloody Donkey”. You are not doing anything in the factory simply standing”. I requested you not to tell me like this in the presence of staff

and workers. At this time you told me “I could have told you worse than this”. To this I said “you can tell me what you want” so you said “you resign and go away, you won't get your salary'. I said in reply that you can suspend me if you want I will not resign.

Based on the above explanation I was not arrogant or even disrepectful to you. In fact, I have been insulted very badly in front of staff and workers. I have been enduring this type of behaviour from you for quite sometime, which has been hampering me in carrying out my normal duties. Specially it is very embarrassing to find that you have changed the work which I have given to the worker without any instruction to me.

Hence there is no reason for taking any disciplinary action against me.”

Thereafter, workman tendered letter of apology to A. Prakash on 22nd September, 1983, as under:

"Dear Sir,

This is to inform you that whatever misunderstanding happened between you and me,I am solely responsible for the same. Hence, I hereby apologize for the same. I am also sorry for the inconvenience caused to you and the company.

Hence, in future, I will try my level best to work in cooperation and interest of the company and see that such incident does not occur in the company. Now I request you to grant me permission to resume my duty from today.

Thanking you, "

Reference to the aforesaid documents has been made purposefully by this Court so that the facts may be clear and there may not be any ambiguity on facts which are not in dispute between the parties. Show cause notice dated 2nd September, 1983 is levelling serious allegations against the workman. In detailed reply to said show cause notice given by

workman on 5.9.1983, the workman has not admitted the charges. On the contrary, the workman has given detailed explanation about the allegations made against the workman which is not admitted by the workman. Then, as per the evidence of workman, he visited Mr. Lalajee Sheth at Bombay who was the owner of the Company or the main person of the Company. After having meeting with the main person of the company at Bombay namely Mr. Lalajee Sheth, a suggestion was made by Mr. Lalajee to contact Mr. A Prakash, Manager of the company. Thereafter, petitioner approached Mr. A. Prakash. Mr. A Prakash suggested him to tender apology and thereafter, the management will reinstate him in service. According to the suggestion made by Mr. A Prakash, workman tendered apology letter with a request to grant permission to resume duty from that date only. Therefore, letter of apology was given by the workman with clear understanding that the workman will be reinstated immediately by the management, because, otherwise, in apology letter, there is no need for the workman to pray for reinstating him today. This apology letter is merely an explanation or

clarification to satisfy the superior and/or to resolve the problem between the parties. It is quite normal tendency/practical solution not to admit allegation but to mention being misunderstanding between the parties so that it may not be considered as an admission of person tendering such letter of apology. Bare perusal of the said letter of apology makes it clear that the workman has not admitted any of the allegation made in the show cause notice dated 2.9.1983. Nature of apology letter is amounting to say sorry to higher authority and nothing else. In view of that, the submissions made by Mr. Patel that this letter of apology amounts to admission of guilt and, therefore, no inquiry is necessary cannot be accepted and, therefore, same is rejected because such letter of apology was given by workman with an intention of removing misunderstanding and to express sorry. Otherwise, there is no need to mention in letter of apology to grant permission for resuming duty immediately. This gives clear picture how incident occurred, what explanation was given by workman and on what basis the letter of apology was obtained by the Management. It is the stand of the

Management that the services of the workman were not terminated by them whereas the evidence of the workman before the labour court would clearly establish the fact that his services were orally terminated by the Manager Mr. A. Prakash on 23.9.1983. It is an undisputed fact that no order of termination was issued in writing and in view of these factual aspects, when apology letter cannot be considered to be an admission of guilt because there is vast difference between admission of facts and admission of guilt. Admission of facts cannot considered as admission of guilt because both are different things. Here, by tendering the letter of apology, the workman has not admitted the allegations levelled against him in the show cause notice. He just clarified or said sorry with an intention to remove misunderstanding occurred and said that he will be more careful in future. Misunderstanding cannot be considered as misconduct. Further, in reply to the show cause notice also, charges levelled against the workman were not admitted by the workman. No departmental inquiry was initiated by the management against the workman under the Standing

Orders which is applicable to the Management. Therefore, it was the legal obligation on the part of the Management to hold full flagged departmental inquiry against the workman before taking any punitive action against the workman. Since that has not been done, punitive action has been taken against the workman without initiating any such departmental inquiry, the action is violative of the principles of natural justice. Stand before the conciliation officer as well as before the Labour Court, Management was taking inconsistent and contradictory stand. Before the Conciliation Officer, it was the stand taken by the Management that they are holding departmental inquiry whereas before the Labour Court, different stand has been taken that the workman has admitted charges levelled against him and, therefore, no inquiry is necessary. Therefore, in view of this discussion and after perusing the award in question and also after considering the reason given by the labour Court, according to my opinion, labour court is right in coming to the conclusion that in respect of the allegations made against the workman in the show cause notice dated 2nd September,

1983, departmental inquiry was necessary but no departmental inquiry was held and, therefore, according to my opinion, labour court was right in setting aside the oral order of termination on that ground. The apex court, in Chandu Lal v. The Management of M/s. Pan American World Airways Inc., reported in AIR 1985 SC 1128 = 1985 II LLJ 181 SC, observed as under in paragraph 8 of Judgment :

> “8. It is difficult to agree with the finding of the Labour Court that when service is terminated on the basis of loss of confidence the order does not amount to one with stigma and does not warrant a proceeding contemplated by law preceding termination. Want of confidence in an employee does point out to an adverse facet in his character as the true meaning of the allegation is that the employee has failed to behave up to the expected standard of conduct which has given rise to a situation involving loss of confidence. In any view of the matter this amounts to a dereliction on the part of the workman and, therefore, the stand taken by the management that termination for loss of confidence does not amount to a stigma has to be repelled. In our opinion it is not necessary to support our conclusion by reference to precedents or textual opinion as

> a commonsense assessment of the matter is sufficient to dispose of this aspect. “Retrenchment” is defined in S.2(oo) of the Industrial Disputes Act and excludes termination of service by the employer as a punishment inflicted by way of disciplinary action. If the termination in the instant case is held to be grounded upon conduct attaching stigma to the appellant, disciplinary proceedings were necessary as a condition precedent to infliction of termination as a measure of punishment. Admittedly this has not been done. Therefore, the order of termination is vitiated in law and cannot be sustained.”

In case of Management of Bombay Ammonia (Madars) Pvt. Ltd., Madras Vs. The Additional Commissioner for Workmen's Compensation II,reported in 1988 I LLJ 203, the Madras High Court (Coram : Honourable Mr.Justice Nainar Sudaram) observed as under in Para.2, 3 and 4.

> “2. Mr.Dwarakanathan, learned counsel for the petitioner, would submit that the order of termination is only for reasonable cause and it was not one passed on a charge of misconduct and hence, to demonstrate that the order of termination was for reasonable cause, the petitioner ought to have been permitted to lead evidence. If in fact the order of termination could not be characterized as one

for a reasonable cause and on the other hand it can be characterized as one passed on a charge of misconduct and if no enquiry was held, then the petitioner cannot be permitted to lead evidence to substantiate that charge before the first respondent for the first time is a proposition not disputed by the learned counsel for the petitioner. Admittedly, there was no enquiry held, there was no evidence placed *Ex facie* the order of termination extracted above levels a charge or imputation against the second respondent that her conduct and attitude had been prejudicial to the petitioner affecting its business and contracts. This would certainly amount to levelling a charge or imputation of misconduct against the second respondent. There are pronouncements of this Court on the subject as to when a particular imputation would amount to an imputation of misconduct or a charge of misconduct. I can refer to the pronouncements of Ramprasada Rao.J, as he then was in Associated Corporation of Industries V/s. Additional Commissioner for Workmen's Compensation (1972-I-LLJ-108) and of Ramanujam.J., in United Wire Ropes Limited V/s. Additional Commissioner (1976-I-LLJ-226) I had occasion to consider the question in W.P.Nos.2211 and 2212 of 1979 order dated 22nd April, 1983 and after recapitulating the principles countenanced by the various pronouncements including those of the highest court in the land, I came to the conclusion

that the order which was put in issue in those cases would fall within the second limb of Section 41(1) of the Act. There, the imputation was the employee was carrying on activities which had been detrimental to the interest of the employer. The latest pronouncement of the Supreme Court, my attention to which was drawn by Mr.N.G.R.Prasad, learned counsel appearing for the second respondent; practically provides an answer to the present question as to whether the imputation of loss of confidence would amount to punishment inflicted by way of disciplinary action. In Chandulal V/s. The Management of M/s.Pan American World Airways (1985-II-LLJ-181) this is what has been observed at p.182:

“It is difficult to agree with the finding of the Labour Court that when service is terminated on the basis of loss of confidence the order does not amount to one with stigma and does not warrant a proceeding contemplated by law preceding termination. Want of confidence in an employee does point out to an adverse facet in his character as the true meaning of the allegation is that the employee has failed to come up to the expected standard of conduct which has given rise to a situation involving loss of confidence. In any view of the matter this amounts to a dereliction on the part of the workman and, therefore, the stand taken by the management that termination

for loss of confidence does not amount to a stigma has to be repelled. In our opinion, it is not necessary to support our conclusion by reference to precedents or textual opinion as a common sense assessment of the matter is sufficient to dispose of this aspect. “Retrenchment” is defined in S.2(oo) of the Industrial Disputes Act and excludes termination of service by the employer as a punishment inflicted by way of disciplinary action. If the termination in the instant case is held to be grounded upon conduct attaching stigma to the appellant, disciplinary proceedings were necessary as a condition precedent to infliction of termination as a measure of punishment. Admittedly, this has not been done. Therefore, the order of termination is vitiated in law and cannot be sustained.”

3. The expressions used in order of termination, are unambiguous and they do throw adverse imputation against the second respondent that she had been acting prejudicially to the petitioner's business interest and contracts and only on this ground, the services of the second respondent were terminated. The order was *ex facie* an order of termination of services founded on misconduct. It is a clear case of action by way of punishment since a charge or imputation of carrying on activities detrimental to the business interest of the petitioner had been

made the condition for the exercise of the power of dispensation of the services of the second respondent. In the said context, it would be a futile and vexatious process and will serve no purpose to examine the matter further in th e light of any evidence contradicting the explicit terms of the order of termination even assuming that the petitioner would cover and desire an opportunity of adducing such evidence in this behalf. Rightly, the first respondent gave the ruling by the impugned order, declining this move of the petitioner and no exception could be had to the said ruling.

4. Mr.Dwarakanathan, learned counsel for the petitioner, would complain that the order impugned in the present writ petition is not very explicit. This is a futile submission because the parties covered a decision on the specific question on the memorandum filed by the second respondent that since her services were dispensed with on a charge of misconduct and since there was no enquiry wherein evidence was placed, there is no question of the petitioner letting in any evidence before the first respondent. It is this question that was answered in the reply statement by the petitioner and it was this question that got adjudicated by the impugned order. The reasons expressed in the impugned order clearly indicate that the first respondent has held that the services of the second respondent

were terminated only on a charge of misconduct and since there was no enquiry held by the petitioner in this behalf, there is no question of substantiating the charge by placing any evidence therefor before the first respondent. For the above reasons, the writ petition is dismissed. No costs.”

In case of Biswajit Dev RoyV/s. Indian Overseas Bank and Others, reported in 1987 I LLJ 288, the Calcutta High Court observed in Para.7 and 8 as under :

“7. Considering the facts and circumstances of the case, it appears that the stand taken by the respondents in this matter is not correct in view of the fact that in the instant case the petitioner's service was terminated on the ground of the said alleged lapse on the part of the petitioner and that the petitioner's service was terminated on that ground alone. The respondents held the petitioner guilty of the same and terminated the service without holding any enquiry and without giving any opportunity of being heard. In this connection a decision of the Supreme Court of India in the case of Board of High School & Intermediate Education U.P. V/s. Kumari Chirta Srivastava reporte din AIR 1970 SC 1039 may be referred wherein in paragraph 8 at page 1040 it was held by the Supreme Court

that “The learned counsel for the appellant, Mr.C.B.Agrawalla contends that the facts are not in dispute and it is further clear that no useful purpose would have been served it Board had served a show cause notice on the petitioner. He says that in view of these circumstances, it was not necessary for the Board to have issued a show cause notice. We are unable to accept this contention where a duty arises in a particular case to issue a show cause notice before inflicting a penalty does not depend on the authority's suggestion that the person to be penalised has no defence but on the nature of order proposed to be passed.” It was further observed in paragraph 9 of the said judgment that “principles of natural justice are to some mind burden-some. But this price, a small price indeed, has to be paid if we desire a society governed by the rule of law.” In another case viz.S.L.Kapoor V/s.Jagmohan reported in AIR 1981 SC 136, it was held by the Supreme Court that merely because facts are admitted it does not follow that material justice need not be observed.

8. So in view of the aforesaid decision of the Supreme Court, even if the contention of Dr.Mukherjee is accepted that the petitioner had no defence, even in that case also no action could have been taken against the petitioner terminating the service of the petitioner without giving the petitioner an opportunity of hearing. From the facts and

circumstances of the case, it appears that the order of termination though innocuously worded, was passed on the allegation of misconduct involving stigma in violation of the principles of natural justice. I am of the view that the petitioner's service could not have been terminated without giving the petitioner an opportunity of hearing before holding that the petitioner was guilty of the said shortage in cash and that the said order of termination was passed by way of punishment in violation of the principles of natural justice."

In case of Sadhna Sahkari Samiti Basantpur Ltd. Vs. Presiding Officer, Labour Court & Anr., reported in 1993 II LLJ 468, the Allahabad High Court (Coram : Honourable Mr.Justice D.S.Sinha) has observed as under in Para.9.

"9. It is well settled that, ordinarily, where the termination of the workman is declared to be illegal his reinstatement must follow. However, the Labour Court has discretion to decline to grant the relief of reinstatement and may award compensation in lieu thereof, if it is satisfied that, on the facts and circumstances of the case, reinstatement will be inexpedient or improper. Loss of confidence of the employer in a

> workman may be circumstance justifying denial of the relief of reinstatement but the plea of loss of confidence can be entertained only if it is founded on material facts and particulars specifically pleaded and proved. The material facts and partuclars in this regard will, *inter alia,* include the role of confidence in the business of the employer, nature of the job performed by the workman and the specification of confidentiality involved therein. In the instant case neither there was requisite pleading with regard to loss of confidence nor any evidence in support thereof before the respondent No.1. It is, therefore, difficult to hold that the respondent No.1 committed any error in denying the benefit to doctrine of loss of confidence to the petitioner and directing the reinstatement of the respondent No.2."

In case of M/s.Sahu Jain Services Ltd., V/s. The First Labour Court, Calcutta and others reported in 1984 LAB.I.C.NOC.92(CAL.), the Calcutta High Court has observed as under :

> "The company had many peons. Petitioner one of them was transferred to Telex Department in place of another peon. His duty in the telex Department was to hand over papers of the department to different persons working under the company at different floors. He was the

only peon deputed in that department at that time. His services were terminated by the Company for loss of confidence as the company had bona fide reason to believe that the petitioner actively connived with other in leaking out confidential messages obtained from Telex Section to the prejudice of the company.

Held, that the termination was unjustified. Surmises are no proof and moreover only on mere surmises or even suspicion a man's service cannot be terminated. There were many other persons working in the company to whom the papers were given and were distributed and it could not be said that the petitioner was the only persons responsible for leakage.

Further, if the company's suspicion was real and concern and apprehension were bona fide having any basis, the petitioner could have been withdrawn from that department and some other peon could have been posted there. The magnitude of the situation, was unduly exaggerated. There was nothing in the whole situation to give him a court dismissal and that also without any charge-sheet in such peremptory manner."

In case of Hotel Horizon Pvt. Ltd. V/s. Bhartiya Kamgar Karmachari Mahasnagh and Another, reported in

2002 I LLJ 186, the Bombay High Court has observed as under :

> "An order of discharge *simpliciter* for loss of confidence is certainly a punitive order, which ought to have been preceded by a domestic enquiry or the employer ought to have proved and justified its action before the Labour Court. In case, the employer adduced cogent material before the Labour Court to justify its action of discharge *simpliciter* for loss of confidence is proved before the Labour Court, there is no question of compliance with Section 25-F of the Industrial Disputes Act. It is not a case of retrenchment but it is a case of punishment for certain acts whereby the employer loses confidence in his workman."

In case of Western India Plywoods Ltd. Vs. Industrial Tribunal, Calicut and others , reported in 1982 II LLJ 113, the Kerala High Court has observed as under :

> "Judicial thinking in India on this aspect has been undergoing changes during the last several years. It was originally though that the decision is entirely within the discretion of the Tribunal and no principle can be laid down so as to fetter the discretion in any way

as the Tribunal has to act solely in the interest of industrial harmony and peace. This position underwent change. It was subsequently held that there is no hard and fast rule in such matters and the Tribunal has no consider each case on its own merits and attempt to reconcile conflicting interest of the employer and the employee, the interest of the employee being entitled to security of employment and protection against wrongful dismissal. Normally there should be an order of reinstatement. However, in exceptional cases where it is not expedient to grant reinstatement, proper relief would be compensation so as to meet the ends of justice. The order has to be based on promotion of twin objectives, namely, security of employment and protection against wrongful dismissal or discharge on the one hand and harmony and peace of the industry on the other. The Tribunal has to take a decision in a spirit of fairness and justice, following rules of justice and reason and after careful examination of the relevant circumstances and balancing of facts. There could be no legalistic or doctrinaire approach in this matter.

14. In a case where the employer states that he has lost confidence in the employee, the matter has to be weighed properly. The mere assertion of the employer that he has lost confidence cannot compel the Tribunal to

> refrain from passing an order of reinstatement. The Tribunal will have to consider whether the employer genuinely feels that it is risky to retain an employee in future or that it is hazardous or pre-judicial of the interest of the industry to do so or is it a mere allegation made to send the employee out of employment."

As regards the contention raised by the learned Advocate Mr. K.M. Patel about loss of confidence, such assertion against the workman amounts to stigma/allegation by the management. Plea of loss of confidence was raised in written statement in one sentence and one sentence in deposition. However, on what basis, the Management has lost the confidence from the employee, that has not been clarified by the management. No evidence in that regard was led by the management to prove serious allegation against the workman after raising plea of loss of confidence. It is necessary to note that in show cause notice dated 2nd September, 1983, though specific allegations were made by the management against workman, in that show cause notice also, plea of loss of confidence is not incorporated by the management.

Contention of loss of confidence was raised by the management against workman before the labour court without making any allegation in that regard in the show cause notice. Allegation of loss of confidence has been considered to be stigma and, therefore, same is required to be proved by holding inquiry against workman in accordance with the principles of natural justice as per the decision of the Apex Court in Chandu Lal v. The Management of M/s. Pan American World Airways Inc., reported in AIR 1985 SC 1128. Therefore, after considering the arguments/submissions made by the learned Advocate Mr.Patel on both the counts, I am of the opinion that the plea of loss of confidence is requiring holding of departmental inquiry. Show cause notice dated 2nd September, 1983 also would require holding of departmental inquiry and yet, undisputedly no departmental inquiry was initiated against the workman by the management. Services of workman were terminated by oral order dated 23.9.1983. Therefore, mere contention about loss of confidence is not enough but same is required to be proved by producing

cogent and convincing evidence in that regard since it amounts to stigma against workman and the management has failed to do so after raising of such contention against the workman. One more aspect is also required to be noted that the management has taken stand before the labour court knowing fully well that the departmental inquiry was not initiated against the workman, then, why the management has not sought permission from the labour court to prove misconduct by leading proper evidence against workman before the labour court. No such permission was sought by the management before the labour court. In view of that, contention raised by the management about the loss of confidence cannot be accepted and same is therefore not accepted.

Conduct of the Management is also required to be noted for which this court has gathered impression from record which shows that the intention of the management was to terminate services of workman immediately and not to wait for inquiry and that is how the management has acted hurriedly

without waiting for inquiry on the basis of letter of apology and then request of workman for taking him in service is turned down by terminating his services orally. Apparently, this is something done by the management with the workman with an ulterior oblique motive after receiving letter of apology from the workman. I fail to understand the strategy which has been adopted/generated by the management. It was clear trap/game of Management against workman. Issuance of show cause notice and receiving reply from the workman, then, where is question arises to ask for apology from workman except to having intention not to hold inquiry against workmnan. So, questions can raise pursuant to letter of apology tendered by the workman. There is no question which would require tendering of letter of apology but evidence of workman was correct and same is believable that he met at Bombay two occasions the main owner of the company namely Lalajee Sheth and thereafter met the Manager A. Prakash who suggested him to tender letter of apology to resolve the matter. For that, the workman agreed and accordingly he tendered letter of apology but second part of the

promise which was orally given was not acted upon by the management and that resulted into termination of service of workman. That is how the incident has occurred with the workman by the management. Management has avoided to hold departmental inquiry and that is how this strategy has been adopted because the workman has not admitted the charges leveled against him in the show cause notice.

As regards letter of apology tendered by the workman for resolving the matter and for removing the misunderstanding between the parties, according to my opinion, before accepting it from the workman, since it was given by the workman in writing, the management ought to have warned him in writing that if such writing is given, then, it can be used against him as an admission. Since that has not been done, it is not open for the management to consider it as admission of guilt and conduct of management in first accepting such letter of apology from the workman without any such warning in writing and then to contend that it amounts to admission of guilt smacks of mala fide against the workman. Therefore,

according to my opinion, plea of loss of confidence cannot be accepted as no cogent evidence is led by the management to prove such plea before the labour court.

Now the only contention is remaining about the definition of workman. It is the specific contention raised by the learned Advocate Mr.K.M.Patel before this Court that the workman herein is not covered by the definition of workman under section 2(s) of the ID Act, 1947. If this contention is elaborated, it is the case of the management that the reference is not maintainable as the workman is not covered by definition of 'workman' under section 2(s) of the Act and, therefore, award is bad. Before considering this question, definition of workman given under section 2(s) of the ID Act, 1947 is required to be considered. Same is, therefore, reproduced as under:

“2(s) “Workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or

implied,and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of, that dispute, or whose dismissal,discharge or retrenchment has led to that dispute but does not include any such person -

(i)who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957) or

(ii)who is employed in the police service or as an officer or other employee of a prison; or

(iii)who is employed mainly in a managerial or administrative capacity; or

(iv)(iv) who being employed in supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature”

Thus, definition of workman under section 2(s) of the ID Act, 1947 covers any person in any industry to do any manual, unskilled, skilled, technical,

operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied,and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of, that dispute, or whose dismissal,discharge or retrenchment has led to that dispute but does not include any such person who is subject to Air Force Act, 1950 or Army Act, 1950 or Navy Act, 1957 or who is employed in police service or who is employed mainly in a managerial or administrative capacity or or draws wages exceeding one thousand six hundred rupees per mensem as specified in clause (i) to (iv) of section 2(s). Looking to the aforesaid definition of workman, if an employee is employed in supervisory capacity and not drawing wags exceeding Rs.1600.00 per mensem, then, he is covered by the definition of workman. Admittedly, at the time of termination of services of the workman, he was drawing wages of Rs.1325.00 per month which is not exceeding Rs.1600.00 per mensem. Therefore, it is the say of the management that the

respondent workman is having some supervisory nature of work to be performed, to direct the subordinate staff or to take work from assisting workmen or to work as shift incharge and having control as well as supervision of subordinate workers. So, merely because a workman is having some supervisory duties though not having power to employ or discharge any subordinate staff but not having salary exceeding Rs.1600.00, then, such employee is not excluded from the definition of workman under section 2(s) of the ID Act, 1947. It is not the case of the management that the workman was having power to take independent decision in respect of the business and policy of company, including the powers to make appointment and/or to terminate or retrench any subordinate staff. There is no power invested in the workman to make appointment/terminate service. There is also no power invested in the workman to impose punishment or initiate any departmental inquiry against any employee. Workman is also not invested with any power to sanction or refuse leave of any staff subordinate to him. These are the requirements which are to be considered while appreciating as to whether any

particular employee would fall within the definition of workman under section 2(s) of the ID Act or not and whether such employee would be excluded from the definition of workman or not. Therefore, looking to the definition of workman in light of the facts of the case before hand, it is clear that the post of chemist is technical post receiving salary not exceeding Rs. 1600.00 per mensum and also incidentally performing some supervisory work, they cannot be considered to be managerial or administrative capacity. There is no iota of evidence produced by the management before the labour court which would justify that the workman was mainly employed in managerial or administrative capacity. Learned Advocate Mr. Patel raised contention before this Court that this definition came into effect by Act 46 of 1982, sec.2(2) w.e.f. 21.8.1984 and before that services of workman were terminated at that time, only Rs.1000.00 salary was there. Therefore, according to him, at the time of termination of services of workman, he was receiving salary exceeding Rs.1000.00 and, therefore, otherwise also, it was out side the scope of section

2(s) of the Act. Submission of Mr. Patel is not correct because in Gujarat, Amendment has come into effect from 1st August, 1981 and by Gujarat Amendment, salary was increased from Rs.1000.00 to Rs.1600.00 which aspect has been taken into account by the Division Bench of this Court in Vallabhbhai Kalyanbhai Sutariya v. Divisional Controller, GSRTC, Rajkot reported in 1993(2) GLR page 1159. Division Bench of this Curt has taken note of this amendment and has come to the conclusion that the salary of Rs.1000.00 has been revised at Rs.1600.00 with effect from 1.8.1981. Therefore, in view of the Industrial Disputes (Gujarat Amendment) Act,1981, limit of wages in Sec. 2(2)(iv) of Rs.1000.00 has been raised to Rs.1600.00 by Amending Act of 1981. Therefore, in view of this, respondent workman was receiving salary of Rs.1325.00, not exceeding Rs.1600.00 and considering the decision in case of Burmah Shell Oil Storage and Distributing CO. of India Ltd. (in CA NO. 1477 of 1970); the Burman Shell Management of Staff Association (In CA No. 1478 of 1970 v. The Burmah Shell Management Staff Association and others, reported in AIR 1971 SC 922 = 1970 II LLJ 509 SC and

also the other decisions referred to hereinafter, the post of Chemist is purely a technical post which would require analysis of raw material which is required to be applied and while doing that work with the assistance of those who are helping the workman, chemist may have some limited power or incidental power to direct to do or not to do some thing and that cannot be considered to be mainly work of managerial or administrative capacity or managerial in nature. Burmah Shell Oil Storage and Distributing CO. of India Ltd. (in CA NO. 1477 of 1970); the Burman Shell Management of Staff Association (In CA No. 1478 of 1970 v. The Burmah Shell Management Staff Association and others, reported in AIR 1971 SC 922 = 1970 II LLJ 509 SC, the Apex Court has observed, in Para.24, as under :

> “**5. Chemists :**
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> 24. On the question of the duties carried nut by a Chemist, the Association examined three witnesses. One of them is M. D. Daniel who had once worked as a Chemist and is now Foreman (Chemicals). The other two are A. N. Dalal and P. N. Maroha who are

both working as Chemists. They have given their qualifications and the nature of work done by them. There are, no doubt, Assistants who assist the Chemists in the laboratory where their work is carried on ; but all the Chemists do their own work which is of technical nature. The Chemists have to personally test the various products received, and also test the products as they are altered in the installations at various stages. All the tests are carried out by the Chemists personally and there are only a few Assistants who do mere routine work in order to assist the Chemist. The Chemists, no doubt, ensure that the workmen assisting them do their work properly; but that small amount of supervision is only incidental to their own technical work of testing and giving the results of tests to the Company. Even the Company's witness Harish Bhargava admitted that the Chemists do a large part of the work themselves, though he added that the Chemists do guide and direct the Analysts and Laboratory Attendant so as to ensure that the work In the laboratory is performed efficiently and properly. Even his evidence does not show that this guidance and direction to the laboratory attendant and analysts is the principal or

substantial work for which a Chemist is employed. In fact, that work is ancillary to the main work which is done by the Chemists themselves. The decision of the Tribunal, consequently, in respect of the Chemists, holding them to be employed on technical work and not in supervisory capacity, must be upheld. They have rightly been held to be workmen.”

In case of Vallabhbhai Kalyanbhai Sutariya Vs. Divisional Controller, SRTC, Rajkot, 1993 (2) GLR 1159, the Division Bench of this Court observed as under in Para.2 and 3 :

“2. The only reason given by the Labour Court for rejecting the Reference on the ground that the petitioner herein was not a workman was that his salary was in excess of Rs.1000/- on the date of the reference. It appears that the Labour Court has lost sight of the Industrial Disputes (Gujarat Amendment) Act,1981 ('the Amending Act” for brief). By this

Amending Act, the limit of Rs.1000/- specified in Sec.2(s) (iv) of the Act has come into force with effect from 1st August,1981. It is not in dispute that the date of the Reference in the instant case is 11th May,1982. The date of dismissal is 10th August,1981 by which time the Amending Act was brought into force. In that view of the matter, the petitioner herein could not have been held to the outside the purview of the workman as defined in Sec.2(s) of the Aft.

3. This point has been answered in favour of the petitioner by the Division Bench ruling of this Court in the case of R.G.Makwana v. Gujarat State Road Transport Corporation & Anr., reported in 1986 GLH 678 : [1986 (1) GLR 392]. In that case the concerned employee was dismissed from service prior the date of coming into force of the Amending Act. The Reference was made after coming into force thereof.

This Court held that what was required to be seen was the concerned employee's salary on the date of the Reference. This Division Bench ruling of this Court in the case of R.G.Makwana (supra) is on all fours applicable in the present case."

In case of S.K.Maini Vs. M/s. Carona Sahu Company Ltd. And Others,Air 1994 SC 1824, the Apex Court has observed in Para.9 as under :

"9. After giving our careful consideration to the facts and circumstances of the case and the submissions made by the learned counsel for the parties, it appears to us that whether or not an employee is a workman under S.2(s) of the Industrial Disputes Act is required to be determined with reference to his principal nature of duties and functions. Such question is required to be determined with reference to the facts and circumstances of the case and materials on record and it is not possible to lay down any strait-jacket formula which can decide the dispute as to the real nature of duties and functions being performed by an employee in all

cases. When an employee is employed to do the types of work enumerated in the definition of workman under Section 2(s), there is hardly any difficulty in treating him as a workman under the appropriate classification but in the complexity of industrial or commercial organisations quite a large number of employees are often required to do more than one kind of work. In such cases, it becomes necessary to determine under which classification the employee will fall for the purpose of deciding whether he comes within the definition of workman or goes out of it. In this connection, reference may be made to the decision of this Court in Burmah Shell Oil Storage and Distribution Company of India Ltd. v. Burmah Shell Management Staff Association, (1970) 2 Lab LJ 590 : (AIR 1971 SC 922). In All India Reserve Bank Employees' Association v. Reserve Bank of India, (1 965) 2 Lab LJ 175 : (AIR 1966 SC 305), it has been held by this Court that the word 'supervise' and its derivatives are not words of precise import and must often be construed in the light of context, for unless controlled, they cover an easily simple oversight and direction as manual work coupled with the power of inspection and superintendence of

the manual work of others. It has been rightly, contended by both the learned counsel that the designation of an employee is not of much importance and what is important is the nature of duties being performed by the employee. The determinative factor is the main duties of the concerned employee and not some works incidentally done. In other words, what is, in substance, the work which employee does or what in substance he is employed to do. Viewed from this angle, if the employee is mainly doing supervisory work but incidentally or for a fraction of time also some manual or clerical work, the employee should be held to be doing supervisory works. Conversely, if the main work is of manual, clerical or of technical nature, the mere fact that some supervisory or other work is also done by the employee incidentally or only a small fraction of working time is devoted to some supervisory works, the employee will come within the purview of 'workman' as defined in S. 2(s) of the Industrial Disputes Act."

In case of Ved Prakash Gupta Vs. M/s. Delton Cable India (P) Ltd. AIR 1984 SC 914, the Apex

Court has observed in Para.12 and 13 as under :

> “12. A perusal of the evidence of WW-1 and MW-1 regarding the nature of the duties performed by the appellant shows that the substantial part of the work of the appellant consisted of looking after the security of the factory and its property by deputing the watchmen working under him to work at the factory gate or sending them to watch-towers or around the factory or to accompany visitors to the factory and making entries in the visitors' register as regards the visitors and in the concerned registers as regards materials entering or going out of the premises of the factory. It must be noted that MW-1 has admitted in his evidence that there is nothing in writing to show what duties are to be carried out by the appellant. Placed in such a situation the appellant might have been doing other items of work such as signing identity cards of workmen, issuing some small items of stores like torch-cells etc. to his subordinate watchmen, which can be got from the stores even under the signatures of watchman and filling up application forms of other workmen and countersigning them or recommending advances and loans or

for promotion of his subordinates. It must also be remembered that the evidence of both WW-1 and MW-1 shows that the appellant could never appoint or dismiss any workman or order any enquiry against any workman. In these circumstances we hold that the substantial duly of the appellant was only of a Security Inspector at the gate of the factory premises and that it was neither managerial not supervisory in nature in the sense in which those terms are understood in industrial law. In the light of the evidence and the legal position referred to above we are of the opinion that the finding of the Labour Court that the appellant is not a workman within the meaning of Section 2 (s) of the Act is perverse and could not be supported. On the evidence available on record we hold that the appellant clearly falls within the definition of a workman in Section 2 (s) of the Act and that the reference of the dispute under Section 10 (i) (c) of the Act is valid in law.

13. The finding of the Labour Court that the enquiry was fair and proper in the light of its own finding that the enquiry officer failed to summon the necessary

witnesses and rejected the request of the appellant for challenging the witnesses could not be stated to be correct. On the merits some witnesses were examined on the side of the management before the Labour Court and they are S. K. Bagga, MW-2, Hira Lal, MW-3, Deep Chand, MW-4 and Laxmi Chand, MW-5 an Accountant of M/s. Gurumukh Dass MW-2 has deposed about the appellant abusing Durg Singh who according to the appellant was the Secretary of a Labour Union while the appellant and others were trying to canvass membership for a rival trade union. MWs-3 and 4 are stated to have corroborated the evidence of MW-2. MW-5 is the only independent witness examined on the side of the management. It is seen from the judgment of the Labour Court relating to the merits of the case that MW-5 who has deposed about the challans Exts M-7 and M-8 having been returned to the person who accompanied him from the maintenance department had not supported the management that the appellant abused Durg Singh or any other person within the premises of the factory. It is also seen from the judgment of the Labour Court that though the appellant had produced before the Enquiry Officer 5 sheets of papers with the signatures of

about 100 workmen of the factory in support of the statement that the appellant had not abused anyone in the factory during the course of his service and the management had produced Exts M-6, a list of 90 persons before the Enquiry Officer, he had not called any of those persons to ascertain the truth regarding the alleged abuse of Durg Singh and S. K. Bagga by the appellant. It is also seen from the judgment of the Labour Court that the appellant was not given a list of the management's witnesses before the commencement of the domestic enquiry. In these circumstances, we are of the opinion that the conclusion of the Labour Court that the Enquiry Officer had not acted properly in the proceedings and that he had not given full opportunity to the appellant as required by law does not call for any interference. The charge levelled against the appellant is not a serious one and it is not known how the charge even if proved would result in any much less total loss of confidence of the management in the appellant as the management would have it in the charge. It was argued in the Labour Court that there was no previous adverse remark against the appellant. There is nothing on record to show that

any previous adverse remark against the appellant had been taken into consideration by the management for awarding the extreme penalty of dismissal from service to the appellant even if he had in fact abused in filthy language Durg Singh and S. K. Bagga. We are therefore of the opinion that the punishment awarded to the appellant is shockingly disproportionate regard being had to the charge framed against him. We are also of the opinion that no responsible employer would ever impose in like circumstances the punishment of dismissal to the employee and that victimization or unfair labour practice could well be interred from the conduct of the management in awarding the extreme punishment of dismissal for a flimsy charge of abuse of some worker or officer of the management by the appellant within the premises of the factory. We therefore hold that the termination of the appellant's service is invalid and unsustainable in law, and that he is entitled to reinstatement with full back wages and other benefits including continuity of, service The appeal is allowed accordingly with costs quantified at Rupees 1,000/-. The writ petition is dismissed without costs.”

In case of Shri Sudhirkumar s/o Sourindrakumar Roy v. M/s. Ferro Alloys Corporation Ltd. 1992 LAB.I.C.657, the Bombay High Court observed in Para.8, 9 and 14 as under:

> “8. After carefully scrutinizing the evidence it appears that the petitioner's main function was that of the Chemist-in-Charge and whatever supervisory work he discharged that was just incidental to his job. Taking the evidence as a whole, it cannot be said that the petitioner was mainly discharging the duties of a supervisory nature. In Arkal Govind Raj Rao v. Ciba Geigy of India Ltd., AIR 1985 SC 985 : (1985 Lab IC 1008) in para 8 of the judgment, the Supreme Court has observed as under (at page SC 987; of AIR) :
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> “The definition of the expression workman hereinbefore extracted clearly shows that the person concerned would not cease to be a workman if he performs some supervisory

duties but he must be a person who must be engaged in a supervisory capacity. Even as a Group Leader of Group II, the evidence produced would show that primarily he continued to work and perform the same duties which have been found to be clerical but along with others in the group he also incidentally looked after the work of other members of the group who were only two in number. It is, therefore, not possible to concur with the inference drawn by the Labour Court contrary to the record that while functioning as Group Leader of Group II, even though appellant was performing his clerical duty the incidental supervisory duties performed by him would make the appellant a person employed in supervisory capacity.”

9. In Burmah Shell Oil Storage and Distributing Co. of India Ltd. V. The Burmah Sheel Management Staff Association, AIR 1971 SC 922 : (1971 Lab IC 699), it has been observed as under :
(at page 713; of Lab IC 1971) :
'On the question of the duties carried nut by a Chemist, the Association examined three witnesses. One of them is M. D. Daniel who had once worked as a Chemist and is now Foreman (Chemicals). The other two

are A. N. Dalal and P. N. Maroha who are both working as Chemists. They have given their qualifications and the nature of work done by them. There are, no doubt, Assistants who assist the Chemists in the laboratory where their work is carried on ; but all the Chemists do their own work which is of technical nature. The Chemists have to personally test the various products received, and also test the products as they are altered in the installations at various stages. All the tests are carried out by the Chemists personally and there are only a few Assistants who do mere routine work in order to assist the Chemist. The Chemists, no doubt, ensure that the workmen assisting them do their work properly; but that small amount of supervision is only incidental to their own technical work of testing and giving the results of tests to the Company. Even the Company's witness Harish Bhargava admitted that the Chemists do a large part of the work themselves, though he added that the Chemists do guide and direct the Analysts and Laboratory Attendant so as to ensure that the work In the laboratory is performed efficiently and properly. Even his evidence does not show that this guidance and direction to the laboratory

attendant and analysts is the principal or substantial work for which a Chemist is employed. In fact, that work is ancillary to the main work which is done by the Chemists themselves. The decision of the Tribunal, consequently, in respect of the Chemists, holding them to be employed on technical work and not in supervisory capacity, must be upheld. They have rightly been held to be workmen.'

The ratio of the above decision seems to be that mere giving of guidance and direction to the Laboratory Attendants and Chemists cannot be said to be principal or substantial work for which a Chemist is employed. Such work appears to be ancillary to the main work which is done by the Chemist. This is exactly the position in the present case.

14. Mr.Vaidya rightly argued that the burden was on the respondent employer to show that the petitioner was working in a supervisory capacity. From the evidence on record, I am of the opinion that the respondent has miserably failed to prove that the petitioner was working in a supervisory capacity. The respondent has not produced any material on record to show

> that the petitioner was working in a supervisory capacity. Even the evidence led on behalf of the respondent does not show that the petitioner was employed in a supervisory capacity. On the other hand, there is overwhelming evidence to show that he was employed as Chemist and was essentially discharging his functions as Chemist. Whatever supervisory work he did that was ancillary to the job. His substantial and primary function remained that of a Chemist. Having regard to these facts, I hold that the petitioner was a 'workman' within the meaning of S.2(s) of Industrial Disputes Act. In view of this, the matter is remanded back to the lower Court for decision on merit. No order as to costs.“

Therefore, according to my opinion, contention raised by Mr. Patel that the respondent was not covered by the definition of workman under section 2(s) of the Act cannot be accepted and labour court was right in appreciating this aspect of the matter.

While appreciating the contention of the management that no order of termination was passed by the management, the labour court was right in

observing that if that is so, then, why management has not written any letter asking the workman to immediately resume the duties. No such letter was written by management to workman to immediately report for duty after receiving letter of apology from the workman. If the workman has not been reporting for duty after tendering letter of apology, then, the management ought to have issued charge sheet for his having remained absent without prior permission. That has also not been done. Such an attitude on the part of the management clearly goes to show that the management has orally terminated services of workman without issuing any notice or without paying any retrenchment compensation and without holding any departmental inquiry.

I have also examined the matter differently on the basis of the submissions made by the learned advocate Mr. Patel. If the submissions are considered to be true that no inquiry was initiated and if it is considered to be oral termination then also, provisions of section 25F/G have not been followed. If the termination is not based upon any misconduct

or allegation, then, it amounts to retrenchment and for retrenching an employee who is a workman under the ID Act, 1947, compliance of section 25F of the ID Act, 1947 is mandatory and it is not the case of the petitioner that it has ever complied with any such provision before terminating the services of workman. Therefore, on that count also, termination of workman is bad in law and therefore, award of reinstatement made by labour court is just and proper.

Further, if the plea of loss of confidence is also considered as stigma or allegation against workman, then also, in absence of any departmental inquiry, such kind of termination is amounting to retrenchment warranting compliance of mandatory provisions of section 25F and for want of compliance of such mandatory provisions, action of termination is void, ab initio.

Workman has deposed at Exh.15 before the labour court. He made it clear that inspite of his earnest efforts to secure job, he has not been able to secure it. He admitted that he was helping his brother in

his business. Except that, there is no other admission on the part of the said witness. In his evidence, workman has specifically clarified that the letter of apology dated 22.9.1983 was not given voluntarily but as per his talks with Mr.Lalajee Sheth at Bombay, he had met Mr. A. Prakash and as per his suggestion, said letter of apology was given with expectation that after giving such letter of apology, services of the workman will remain continue and therefore, with such hope, it was given for removing misunderstanding between the parties.

In case when the labour court comes to the conclusion that the order/action of termination of a workman is unjustified and contrary to the principles of natural justice, and it has been passed without affording an opportunity of hearing to employee concerned, then, in such circumstances, reinstatement cannot be denied to the workman. That aspect has been examined by the apex court in The Workmen of Assam Match CO. Ltd. And The Presiding Officer, Labour Court, Assam and Another, reported in 1973 II LLJ 279. The relevant observations made by the Apex

Court in paragraph 5, 7, 8 and 9 are reproduced as under:

> “5. In our opinion, the answer to the question raised by the appellants must unhesitatingly be given in their favour. It is well-settled that where in an industrial dispute arising out of a dismissal of a workman, it is established that the impugned dismissal was unjustified, normal rule is that the dismissed workm an should be reinstated. In regard to disciplinary actions which the employees are entitled to take against their employees, the position in law is no longer in doubt. The employer can hold an enquiry against his employee whenever the employer feels that the employee has committed misconduct as a result of which he should be dismissed from service. If the enquiry is properly conducted and the conclusion reached at the enquiry does not appear to be perverse the impugned order of dismissal cannot be successfully challenged before the Tribunal. On the other hand, if the enquiry is not properly conducted or the findings recorded at the said enquiry appear to be perverse in the sense that they are not justified by any evidence whatever, the Industrial Tribunal can examine the question about the alleged misconduct of the employee on evidence which may be adduced before it by the employer and

decide whether the employer is entitled to dismiss the employee. These principles have been laid down by this Court in several decisions, and both the parties have argued the present appeal before us on the basis of these principles.

6. xxx

7. We are not impressed by this argument. As we have repeatedly pointed out, if an employer is shown to have dismissed his employee without justification and the decision of the dispute resulting from such illegal dismissal takes place, it cannot be urged by the employer that by reason of passage of time, reinstatement should not be ordered. One of the objects which industrial adjudication has to keep in mind is to assure industrial employees security of tenure. There is no doubt that security of tenure for industrial employment tends to create harmonious relations between the employer and the employee, and so this Court has consistently held that in cases of wrongful or illegal dismissal, the normal rule is that the employee who has been illegally or wrongfully dismissed should be reinstated. We are, therefore, satisfied that the contention raised by the Solicitor-General against reinstatement on the ground of passage of

time cannot be accepted.

8. It is then urged that the Tribunal was justified in taking into account the fact that having regard to what has happened in the present proceedings, it should be held that the respondent has lost confidence in Dutt and that would be a ground for refusing reinstatement to him. This argument is plainly misconceived. We do not think it would be possible to accept the contention that even if an employer is shown to have dismissed his employee wrongfully and without justification, the fact that he has adopted such a course (sic) should be taken into account while determining whether reinstatement should be ordered or not. It would, we think, be unfair to allow an employer in such a case to urge that though the charge framed against his employee was not justified, the fact that a domestic enquiry was held against him on such a charge has led to a loss of confidence in the mind of the employer, and so, the employee should not be reinstated. If this contention were to prevail, the industrial employees who are illegally or unjustifiably dismissed would never get the relief of reinstatement. Cases may conceivably arise where the plea of loss of

confidence may and can be entertained but we have no doubt that the present case does not fall under that category.

9. Beside, we cannot over look the fact that on the findings of the Tribunal, the record of Dutt for 11 years in the employment of the respondent has been without a blemish. Dutt is, therefore, entitled to claim reinstatement with the respondent when he is shown to have served the respondent for 11 long years, and it appears that ordinarily he is entitled to look forward to another long spell of service with the respondent. It is remarkable that though Hussain was similarly charge sheeted by the respondent and was ordered to be dismissed, on the findings recorded by the Tribunal, his reinstatement has been ordered. We wee no distinction between the case of Hussain and that of Dutt. The fact that Dutt was a foreman in charge of the motor vehicles of the respondent and Hussain was driver of one these vehicles cannot make any difference to the decision of the question with which we are concerned. “

In para 15 of the award, labour court has examined the question of back wages. Initially, it is

the burden upon the workman to prove that he has remained unemployed or that he has not been gainfully employed inspite of his best efforts. If that is proved, then, such burden would stand shifted upon the management to establish that the workman has been working elsewhere and has been earning during the intervening period. By giving his oral evidence at Exh. 15 before the labour court, the workman has proved his unemployment during the intervening period. In view of that, management ought to have produced the evidence to show that he was employed and earning during the intervening period. Management has not proved gainful employment of the workman during the intervening period. Therefore, working of the workman with his brother and his assistance to his brother in his business cannot be considered to be gainful employment as per the view taken by the apex court in Rajendrakumar Kindra v. Delhi Administration through Secretary (Labour) and others, reported in AIR 1984 SC 1805. Employee in the said decision during the forced absence for maintaining his family was helping his father in law in his coal depot and was living with his father in law. Apex

Court held that it was not gainful employment. It has also been held by the Apex Court that if that could be gainful employment, then begging by the employee would as well be gainful employment, in the circumstances the employee was entitled to full back wages and all consequential benefits.

In case of Rajinder Kumar Kindra Vs. Delhi Administration through Secretary (Labour) and others, AIR 1984 SC 1805, the Apex Court has observed in Para.21 as under :

> “21. It was next contended on behalf of the appellant that reinstatement with full backwages be awarded to him. Mr. P. K. Jain, learned counsel for the employer countered urging that there is evidence to show that the appellant was gainfully employed since the termination of service and therefore he was not entitled to back-wages. In support of this submission Mr. Jain pointed out that the appellant in his cross-examination has admitted that during his forced absence from employment since the date of termination of his service, he was maintaining his family by helping his father-in-law Tara Chand who owns a coal-

depot, and that he and the members of his family lived with his father-in-law and that he had no alternative source of maintenance. If this is gainful employment, the employer ran contend that the dismissed employee in order to keep his body and soul together had taken to begging and that would as well be a gainful employment. The gross perversity with which the employer had approached this case had left us stunned. If the employer after an utterly unsustainable termination order of service wants to deny backwages on the ground that the appellant and the members of his family were staying with the father-in-law of the appellant as there was no alternative source of maintenance and during this period appellant was helping his father-in- law Tara Chand who had a coal depot, it cannot be said that the appellant was gainfully employed. This was the only evidence in support of the submission that during his forced absence from service he was gainfully employed. This cannot be said to be gainful employment so as to reject the claim for backwages. There is no evidence on the record to show that the appellant was gainfully employed during the period of his absence from service. Therefore,

the appellant would be entitled to full backwages and all consequential benefits."

Therefore, the labour court has rightly appreciated the evidence led before him and has given cogent reasons in support of his conclusion to the effect that having presumed that the workman is a chemist as well as an educated employee and remained without work for such a long period,it may not be proper to believe so, therefore, taking these aspects into consideration, labour court granted 50 per cent back wages for intervening period with all other consquential benefits. Decision which has been relied upon by the learned Advocate in case of UP State Brassware Corporation Ltd. And Another versus Uday Narain Pandey, 2006 (1) SCC 479 and other decisions cited at the Bar have been considered by this court in detail. It is true that there may not be straight jacket formula for making an award of back wages in case the termination is held to be illegal. However, the Court is required to consider the facts and circumstances of each case independently. Here, the

labour court has rightly appreciated two aspects of the matter while considering the case for back wages, that the workman is helping his brother in his business and is not employed in any establishment and that there was no evidence from the management to controvert this evidence of the workman. In the peculiar circumstances of this case, services of the workman were abruptly terminated by the management without holding departmental inquiry after receiving letter of apology from workman and workman has remained without job for intervening period. These are the compelling circumstances as well as relevant consideration while considering the case for back wages to the extent of 50 per cent. In view of this, contention raised by Mr. Mankad cannot be accepted simply on the ground that it is the discretionary power of the court and on the basis of the facts before it, labour court has rightly exercised such discretionary power and in exercising such discretionary powers, labour court has not committed any error and has rightly granted back wages to the extent of 50 % only by giving cogent reasons for the same. Therefore, according to my opinion, labour

court has not committed any error warranting interference of this Court in exercise of the powers under Article 227 of the Constitution of India and the award made by the labour court is required to be confirmed as a whole.

Labour court has rightly granted reinstatement with continuity of service with consequential benefits when termination is held to be bad in law and violative of the principles of natural justice. Therefore, labour court has not committed any error in passing the award in question. This court is having very limited powers while exercising powers under Article 227 of the Constitution of India. Unless the findings recorded by the labour court are proved to be perverse or contrary to the evidence on record, this court cannot disturb the same being the finding of fact. Here, since it has not been proved by the management that the findings of labour court are perverse or contrary to evidence on record, these findings of fact cannot be disturbed by this court. Similarly, Mr. Mankad has also not been able to point out that the labour court has erred in granting only

50 % back wages and full back wages should be awarded.

This aspect has been considered by the apex court in Laxmikant Revchand Bhojwani and another versus Pratapsing Mohansingh Pardeshi, reported in (1995) 6 SCC 576. Relevant observations made by the apex court in para 9 of the said judgment are therefore reproduced as under:

> “The High Court under Article 227 cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice, where grave injustice would be done unless the High Court interferes. “

In Ouseph Mathai and Others versus M. Abdul Khadir, reported in (2002) 1 SCC 319, the apex court observed as under in para 4 and 5 :

> “It is not denied that the powers conferred upon the High Court under Articles 226 and 227 of the Constitution are extraordinary and

discretionary powers as distinguished from ordinary statutory powers. No doubt Article 227 confers a right of superintendence over all courts and tribunals throughout the territories in relation to which it exercises the jurisdiction but no corresponding right is conferred upon a litigant to invoke the jurisdiction under the said Article as a matter of right. In fact power under this Article cast a duty upon the High Court to keep the inferior courts and tribunals within the limits of their authority and that they do not cross the limits, ensuring the performance of duties by such courts and tribunals in accordance with law conferring powers within the ambit of the enactments creating such courts and tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction under this Article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate courts and tribunals resulting in grave injustice to any party.

5. In Waryam Singh v. Amarnath (1954 SCR 565) this Court held that power of superintendence conferred by Article 227 is to be exercised more sparingly and only in appropriate cases in order to keep the subordinate Courts within the bounds of their authority and not for correcting mere errors. This position of law was reiterated in Nagendra Nath Bose v. Commr. of Hills Division (1958 SCR 1240). In Bhahutmal Raichand Oswal v. Laxmibai R. Tarta (AIR 1975 SC 1297) this Court held that the High Court could not, in the guise of exercising its jurisdiction under Article 227 convert itself into a Court of appeal when the Legislature has not conferred a right of appeal. After referring to the judgment of Lord Denning in R v. Northumber Compensation Appeal Tribunal, Exparte Shaw (1952 (1) All ER 122, 128) this Court in Chandavarkar Sita Ratna Rao v. Ashalata S. Gurnam held : (SCC p.460 para 20)

"20. It is true that in exercise of jurisdiction under Article 227 of the Constitution the High Court could go into the question of facts or look into the evidence if justice so requires it, if there is any misdirection in law or a view of fact taken in the teeth of preponderance of evidence. But the High Court should decline to exercise its jurisdiction under Articles 226 and 227 of the Constitution to look into the fact in the absence of clear and cut down reasons where the question depends upon the appreciation of evidence. The High Court also should not interfere with a finding within the jurisdiction of the inferior tribunal except where the findings are perverse and not based on any material evidence or it resulted in manifest injustice (see Trimbak Gangadhar Teland 1977 (2) SCC 437). Except to the limited extent indicated above, the High Court has no jurisdiction. In our opinion therefore, in the facts and circumstances of this case on the question that the High Court has sought to

interfere, it is manifest that the High Court has gone into questions which depended upon appreciation of evidence and indeed the very fact that the learned trial Judge came to one conclusion and the Appellate Bench came to another conclusion is indication of the position that two views were possible in this case. In preferring one view to another of factual appreciation of evidence, the High Court transgressed its limits of jurisdiction under Article 227 of the Constitution. On the first point, therefore, the High Court was in error."

In Roshan Deen versus Preeti Lal, reported in (2002) 1 SCC 100, the apex court observed as under in paragraph 12:

> “We are greatly disturbed by the insensitivity reflected in the impugned judgment rendered by the learned Single Judge in a case where judicial mind would be tempted to utilize all possible

legal measures to impart justice to a man mutilated so outrageously by his cruel destiny. The High Court non suited him in exercise of a supervisory and extraordinary jurisdiction envisaged under Article 227 of the Constitution. Time and again this Court has reminded the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it (vide State of UP v. District Judge, Unnao [(1984) 2 SCC 673: AIR 1984 SC 1401]). The very purpose of such constitutional powers being conferred on the High Court is that no man should be subjected to injustice by violating the law. The lookout of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If

justice became the by-produce of an erroneous view of law, the High Court is not expected to erase such justice in the name of correcting the error of law."

Therefore, in view of the aforesaid judgments and since the petitioner in both the petitions has not been able to point out any infirmity and/or jurisdictional error committed by labour court in the impugned award, both the petitions are required to be dismissed.

In result, both the petitions are dismissed. Rule in both the petitions is discharged. Interim relief, if any, granted in the petition of the management, same shall stand vacated forthwith. There shall be no order as to costs.

(H.K. Rathod,J.)

Vyas